

D.P.U. 92-146

Petition of Williams/Newcorp Generating Company, pursuant to 220 C.M.R. § 8.07(2), for relief from the actions of Boston Edison Company in connection with BECo's RFP3.

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## I. INTRODUCTION

### A. Procedural History

On January 31, 1992, Williams/Newcorp Generating Company ("Williams"), submitted a project proposal in Boston Edison Company's ("BECO's" or "Company's") third request for proposals ("RFP 3") from non-utility generators ("NUGs").<sup>1</sup> On June 10, 1992, Williams filed a petition ("Petition") with the Department of Public Utilities ("Department"), pursuant to 220 C.M.R. § 8.07(2). The Petition asked the Department that BECO inappropriately adjusted Williams' self-score of its proposal,<sup>2</sup> and to require BECO to begin contract negotiations with Williams as a member of the RFP 3 award group (Petition at 10). The Petition alleges that BECO inappropriately scored Williams' bid, reducing its total points in the evaluation process. Williams asserts that BECO should not have scored Williams' project as it did because (1) Williams followed BECO's instructions using 8,760 period hours in calculating its price score, (2) Williams' proposal is reasonable within the meaning of RFP 3 and the Department's regulations and precedent, and (3) BECO improperly used unpublished criteria to score Williams' project (id. at 3, 5, and 7).

On June 24, 1992, Altresco Financial, Inc. ("Altresco") filed a petition for leave to intervene in this docket.<sup>3</sup> On July 2, 1992, Williams filed a supplement to its Petition, together with a memorandum of law and an affidavit of Brian Williams, both supporting its

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<sup>1</sup> Williams proposed to sell output from a 25 megawatt ("MW") combustion turbine peaking unit.

<sup>2</sup> Williams refers to BECO's adjustments to Williams' self-score as "BECO's rescoring."

<sup>3</sup> Altresco submitted a proposal in response to RFP 3 to sell power from a 132 MW from a proposed natural gas-fired combined cycle unit in Lynn, Massachusetts.

Peti ti on. On July 10, 1992, the Department i ssued an Order of Noti ce that (1) set July 15, 1992 as the deadl i ne to fi le a peti ti on for leave to i ntervene i n thi s docket, (2) establi shed requi rements for fi li ng an answer or response to Wi lli ams's peti ti on, and (3) set July 24, 1992 as the date to fi le any such answer or response. On July 10, 1992, the Attorney General of the Commonweal th ("Attorney General") fi led a noti ce of i nterventi on pursuant to G.L. c. 12, § 11E. On July 15, 1992, CMS Generati on Co. and Montvale Energy Associ ates, L.P. (joi ntly "CMS") fi led a peti ti on for leave to i ntervene.<sup>4</sup> On July 23, 1992, the Heari ng Offi cer i ssued a rul i ng (1) denyi ng the peti ti on to i ntervene of Al tresco, (2) granti ng Al tresco li mi ted parti ci pant status to address the legal i ssues rai sed i n thi s docket, and (3) denyi ng the peti ti on of CMS to i ntervene i n thi s case.

On July 24, 1992, BECo fi led i ts answer ("BECo Answer") to Wi lli ams Peti ti on, accompani ed by a memorandum i n opposi ti on to Wi lli ams Peti ti on ("BECo Memorandum") and affi davi ts by Wi lli am P. Ki l l goar ("Ki l l goar Affi davi t") and John J. Reed. On July 24, 1992, Al tresco fi led an answer i n support of BECo's rescori ng of Wi lli ams proposal ("Al tresco Answer").<sup>5</sup> On July 30, 1992, the Heari ng Offi cer i ssued a noti ce that Wi lli ams

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<sup>4</sup> CMS also submi tted a proposal i n RFP 3.

<sup>5</sup> Al so on July 24, 1992, Al tresco fi led a moti on for summary judgment. On July 28, 1992, Al tresco appealed to the full Commi ssi on the Heari ng Offi cer's July 23, 1992, rul i ng denyi ng Al tresco's peti ti on to i ntervene. On July 31, 1992, Wi lli ams fi led a moti on to stri ke porti ons of the Al tresco Answer and an Opposi ti on to Al tresco's moti on for summary judgment. Al tresco responded on August 5, 1992 to Wi lli ams' opposi ti on to Al tresco's appeal of the Heari ng Offi cer's rul i ng and on August 7, 1992 to Wi lli ams' moti on to stri ke. Because of the Department's di sposi ti on of thi s case, the Department need not rule on these moti ons or the appeal of the Heari ng Offi cer rul i ng. We make no further fi ndi ngs regardi ng Al tresco's status as a party or li mi ted parti ci pant i n thi s proceedi ng. Moreover, i n l i ght of our deci si on to reject the subject Peti ti on, we expressly do not reach the i ssue of whether li mi ted parti ci pants may fi le moti ons for summary judgment.

could respond to BECo's Answer no later than August 6, 1992. On August 6, 1992, Williams filed a response to BECo's Answer and Al tresco's Answer, accompanied by an affidavit of Daniel Lupfer ("Lupfer Affidavit").

B. Background on BECo's RFP 3

Pursuant to approval by the Department, BECo issued its RFP 3 on October 11, 1991.<sup>6</sup> By January 31, 1992, the response deadline for proposals in RFP 3, BECo received 41 project proposals for a total of 3,300 MW.

On May 20, 1992, BECo petitioned the Department to defer further activities in RFP 3 to its first integrated resource management ("IRM") proceeding,<sup>7</sup> and in particular to defer announcing the award group and negotiating purchased power contracts with award group members. On June 1, 1992, BECo announced that it had selected the Al tresco Lynn project proposal as the sole member of the RFP 3 award group. On June 2, 1992, the Department ordered BECo to announce the award group but granted a temporary stay of BECo's obligation to negotiate and execute a purchase power contract with the RFP 3 award group. Boston Edison Company, D.P.U. 90-130-1, at 11, 13 (1992). During the following

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<sup>6</sup> As issued, BECo's RFP 3 provided for a tentative supply block within the range of 132 MW to 306 MW. Boston Edison Company, D.P.U. 90-270, at 35 (1991). The Department later set the size of the final supply block at 132 MW. Boston Edison Company, D.P.U. 90-270-C at 4 (1992).

<sup>7</sup> On July 24, 1992, the Attorney General filed a letter in this docket that recommended that BECo's "RFP 3 bidders submit new bids relying on (after Commission review) updated BECo avoided costs." The issue regarding the filing of new bids with updated cost information was resolved by the Department's recent decision in Boston Edison Company, D.P.U. 92-130 (1993), by requiring BECo to negotiate with the award group based on the existing project proposals.

month, Williams and three other project sponsors<sup>8</sup> submitted petitions to the Department, generally claiming that their bids were improperly scored, thereby challenging BECo's designation of Altresco as the sole award group member. In addition, two other project sponsors<sup>9</sup> filed petitions with the Department because of BECo's decision to disqualify their bids.

On June 25, 1993, the Department issued an Order denying BECo's May 20, 1992 petition to defer further activities in RFP 3. Boston Edison Company, D.P.U. 92-130 (1993). The Department required BECo to begin negotiating a purchase power contract with the RFP 3 award group, but suspended BECo's obligation to execute a contract with the RFP 3 award group until the Department issues final orders in the proceedings involving challenges to the rankings in BECo's RFP 3. Id. at 33-34.

On June 30, 1993, BECo filed with the Department a motion for immediate stay of the Department's June 25, 1993 Order in D.P.U. 92-130. In an Order dated July 14, 1993, the Department denied this motion. Boston Edison Company, D.P.U. 90-130-A (1993). Also on July 14, 1993, BECo filed an appeal of the Department's June 25, 1993 Order with the Massachusetts Supreme Judicial Court.

## II. STANDARD OF REVIEW

The Department's regulations governing the purchase of power from NUGs state that

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<sup>8</sup> The three other proceedings regarding allegations of improper scoring are CMS Generating Company and Montvale Energy Associates, L.P., D.P.U. 92-166; Bio Development Corporation, D.P.U. 92-167; and Concord Energy Corporation, D.P.U. 92-144.

<sup>9</sup> The two proceedings regarding disqualified bidders were DLS Energy, Inc., D.P.U. 92-153, and West Lynn Cogeneration, D.P.U. 92-142. West Lynn Cogeneration has since withdrawn its petition.

if, "at any time, a qualifying facility is aggrieved by an action of a utility pursuant to these regulations, the qualifying facility may petition the Department to investigate such action." 220 C.M.R. § 8.07(2). In reviewing any petition filed pursuant to 220 C.M.R. § 8.07(2), the Department applies a standard of "reasonableness." In Riverside Steam and Electric Company, D.P.U. 88-123, at 19-20 (1988), the Department stated

In reviewing the utility's actions, the Department will not substitute its own judgment for that of the utility so long as there is a reasonable basis for the utility's actions. Thus the Department will impose appropriate remedies only if it finds that, given what the utility knew or should have known at the time, its actions had no reasonable basis. Under 220 C.M.R. § 8.07(2), the burden of proof is on the aggrieved OF [qualifying facility].

Id. at 20; see also Destec Energy et al., D.P.U. 92-46, at 4-5 (1992) ("Destec"); EUA Power Corporation, D.P.U. 92-38, at 5 (1992); Riverside Steam and Electric Company, D.P.U. 88-123-B at 7, 50 (1991); and Boston Edison Company, D.P.U. 88-158, at 23 (1990).

Furthermore, the Department has recognized that in the management of its request for proposals ("RFP") process, an electric company is allowed a measure of discretion:

[I]n matters concerning an approved RFP, the Department will allow an electric company a measure of discretion in administering and managing the RFP process. Allowing a measure of discretion at this stage in the RFP process is appropriate in light of the Department's regulations [220 C.M.R. §§ 8.00 et seq.] governing other stages of the RFP process where explicit requirements for the content of an RFP and the solicitation and contracting processes are evident.

Destec at 13. In Destec, the Department reaffirmed its position that electric utility companies may use discretion in implementing the instructions and requirements of an RFP, but also indicated that an electric company must administer its RFP in a manner that prevents favoritism and treats all project sponsors equitably. Id. at 13-14.

Additionally, the Department must endeavor to ensure that an electric company's scoring system is applied in a manner that maximizes net benefits to ratepayers. See 220 C.M.R. § 8.05(5)(c). Therefore, in assessing the reasonableness of BECo's application of its scoring system, the Department will consider whether a scoring decision appropriately recognizes the actual benefits that a proposed project offers ratepayers.

### III. RESCORING ISSUE

#### A. Introduction

BECo's RFP 3, as approved by the Department, provides that a "Sponsor's Price Bid may be comprised of \$/KW-YR [\$/kilowatt-year] or ¢/Kwh [cents per kilowatt-hour] rates, however, the use of \$/KW-YR rate is reserved for Dispatchable Facilities" (BECo RFP 3, at A-2). RFP 3 provides that

\$/KW-YR or \$/KW-MO [\$/kilowatt-month] components of a Sponsor's Price Bid ... must be converted to an equivalent ¢/KWH rate in order to calculate Sponsor's Price Factor Score. The calculation required to convert from \$/KW rates to ¢/KWH rates is established below and is based on an assumed 90% equivalent availability factor ["EAF"] ....

$$\text{¢/kWh} = \frac{(\$/\text{KW/Year})}{\text{Period Hours} \times 0.90} \times 100$$

(id. at A-4 and A-5).

Williams proposed a unit that would be available to the Company only 1,500 hours per year, with a price that was fixed and would be paid in \$/KW only, including all fuel costs (Petition at 2, 4; BECo Memorandum at 9). BECo reduced Williams' claimed price score by 77.8 points by recalculating Williams' score using 1,500 hours per year as the Period Hours in the above formula, instead of the 8,760 hours that Williams had used in scoring itself (BECo Memorandum at 9-11, 13).

## B. Posi ti ons of the Parti es

### 1. Wi lli ams

Wi lli ams states that i ts project proposal contai ned a fi xed \$/KW charge wi thout a vari able fuel charge, si nce i ts gas supply contract i s a take-or-pay contract, whi ch i ncludes gas transportati on but i mposes no vari able fuel costs on the project (Peti ti on at 2, 7). Wi lli ams clai ms that pursuant to i nstructi ons that i t recei ved from BECo<sup>10</sup> i t calculated i ts pri ce score by di vi di ng the annual equi val ent of i ts proposed fi xed charge by 7,884 hours per year (90 percent of al l 8,760 hours i n the year) to arri ve at a ¢/KWH pri ce (i d. at 2).

Wi lli ams contends that, i n fol l owi ng the requi rements establi shed i n RFP 3 and i n the subsequent correspondence from BECo (the December 30 Letter), Wi lli ams was enti tled to the pri ce score i t clai med (i d. at 45). Wi lli ams argues that i t fol l owed BECo's i nstructi ons i n the December 30 Letter and di vi ded the annual equi val ent of i ts bi d fi xed charge (\$/KW-yr) by the Peri od Hours, whi ch that same Letter defi ned to be 8,760 hours i n a year, mul ti pli ed by a 90 percent EAF (i d. at 2). Wi lli ams asserts that BECo, i n effect, declared i ts own scori ng formula i ncorrect after al l bi ds were i n, and then appl i ed another, unpubl i shed, pri ce scori ng formula to eval uate the bi ds (i d. at 8-10). Moreover, Wi lli ams argues that by

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<sup>10</sup> The i nstructi ons are contai ned i n a December 30, 1991 Letter ("December 30 Letter") from Paul Vai tkus of BECo to Dani el Lupfer of Pl ace Associ ates, Wi lli ams' consultant (Peti ti on, Exh. WM-2). BECo's December 30 Letter responded to a December 18, 1991 Letter from Mr. Lupfer, whi ch had sought "a defi ni ti on of 'Peri od Hours' i n the denomi nator of the equati on, ... as i t pertai ns to a peaki ng faci l i ty" that may operate much l ess than 8,760 hours per year (Lupfer Affi davi t, Exh. 2).

BECo's December 30 Letter repl i ed that RFP 3 requi res that \$/KW-YR be converted i nto ¢/KWH usi ng a 90 percent EAF "over an annual peri od (8760 hrs/yr).... Al l project proposals, regardless of operati onal mode, must use the 0.9 EAF and 8760 hours when converti ng from \$/kw-yr to ¢/kwh" (Peti ti on, Exh. WM-2).



contracting for a fixed cost fuel supply, it would lower the risk to ratepayers of high fuel cost pass-throughs, which should result in a reward rather than a penalty in the project proposal scoring system (i.d. at 6).

## 2. BECo

BECo claims that Williams, in its December 18 letter to BECo regarding calculation of the standard price score, failed to disclose (1) that it intended to recover its fuel and other variable costs through a fixed pricing mechanism, and (2) that its unit had a dispatch limitation (BECo Memorandum at 9-10). BECo further claims that Williams' failure to disclose this information affected the answer it provided Williams in the December 30 Letter (i.d. at 10). BECo claims that it rescored Williams' bid because when its scoring system was applied to the Williams project, the scoring system yielded a price score that bore no relation to the true economic value of the Williams project, since the actual annual payments from BECo to Williams would be 300 percent higher than the figure Williams used to calculate the Price Factor Score (i.d. at 9-10).

Therefore, BECo indicated that in order to match Williams' Price Factor score to the true economic value of the project, BECo reassessed Williams' Price Factor score using the actual payments (from Williams' pro forma financial statement) which are consistent with 1,500 hours per year rather than 8,760 hours), resulting in a 77.8 scoring point reduction (i.d. at 9-11). Accordingly, BECo states that it reduced Williams price score by 77.8 points (Kilgoar Affidavit, Attachment 7, at 3).

BECo also claims that Williams's proposed facility is not dispatchable, since its operations are limited to 1,500 hours per year (BECo Memorandum at 11). Accordingly,

BECo contends ~~W~~ Williams was not entitled to use the \$/KW rate that it in fact used, and BECo asserts use of the \$/KW rate itself would be grounds for disqualifying the bid (i.d.).

### C. Analysis and Findings

The Department's QF regulations state:

[T]he ranking formula adopted by the utility must recognize continuous trade-offs in net ratepayer benefits between various measurable criteria used to score Project Proposals. The ultimate goal of the utility's ranking formula must be to maximize net benefits to ratepayers.

220 C.M.R. § 8.05(5)(c).

The Department seeks to implement and oversee a solicitation process that treats project sponsors fairly and ensures that the interests of ratepayers are protected. The Department approved BECo's RFP<sup>3</sup> with the important objective in mind of maximizing economic value to ratepayers.

Project economics are a critical part of a decision about which projects are selected for an award group. In our review of an RFP price scoring formula, the Department seeks to ensure that the economic value of each proposal will be reflected in the scoring process without imposing unduly rigid pricing criteria. The Department sought to ensure this result by approving the price provisions of BECo's RFP, including the provision that, for dispatchable projects, \$/KW price bids would be converted to ¢/KWH by dividing by the hours in the period.

The Department notes that ~~W~~ Williams' scoring of its project appears to be consistent with the technical instructions set forth in BECo's December 30 Letter.<sup>11</sup> However, the

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<sup>11</sup> We note that the Department approved RFP 3 but did not approve (nor need to approve) the December 30 Letter from BECo regarding application of RFP 3 instructions.

Department agrees with BECo that Wiliams' variable fuel cost price proposal of zero made Wiliams' use of 7,884 hours in the formula inappropriate, because it would not enable BECo to establish the true economic value of Wiliams' proposal. In light of this dilemma, BECo acted appropriately by (1) recognizing the actual effect of Wiliams' price proposal on ratepayers, and (2) adjusting Wiliams' score to reflect the true value of the project. Stated differently, it would have been unreasonable for BECo (1) to ignore the inconsistency between Wiliams' claimed price score and the actual payments from its pro forma financial statement, and (2) to accept Wiliams' claimed price score, because it was not based on Wiliams' proposed period of operation, 1,500 hours per year.<sup>12</sup> Accordingly, the Department finds that, given the circumstances and recognizing the actual benefits that the Wiliams project offers to ratepayers, Wiliams has not shown that BECo's adjustment to Wiliams' Price Factor score was unreasonable.

Regarding Wiliams argument that it still lowers the risk to ratepayers of high fuel cost pass-throughs, Wiliams already has been rewarded in BECo's scoring system for lowering this risk, under "Price Formula Risk Allocation Score" (RFP 3, Evaluation Sheet No. 6). Again, Wiliams has not shown that BECo's adjustment to Wiliams' Price Factor score was unreasonable.

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<sup>12</sup> While BECo asserts that the project is not dispatchable and therefore not entitled to use the subject scoring formula, the Department finds that the meaning of dispatchability in this case is open to interpretation. However, the meaning of dispatchability is not the real issue in this case. Rather, the issue is which application of the scoring price formula reflects the true economic value of the project.

I V. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That the petition of Williams/Newcorp Generating Company filed with the Department on June 10, 1992 be and hereby is DENIED.

By Order of the Department,